State of Rhode Island and Providence Plantations

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

December 9, 2016
PR 16-50

Mark McBurney, Esquire

RE: Clark v. West Glocester Fire District

Dear Attorney McBurney:

The investigation into your Access to Public Records Act ("APRA") complaint filed on behalf of your client, Mr. Trevor Clark, against the West Glocester Fire District ("WGFD") on February 27, 2014, is complete.

On February 12, 2014, you made a request to the WGFD requesting:

> "1. All documents seen by WGFD Board President William Flynn indicating that there might be a convicted arsonist on the WGFD, and all documents created by William Flynn in response thereto.
> 2. All documents seen by WGFD Chief Labutti indicating that there might be a convicted arsonist on the WGFD, and all documents created by Chief Labutti in response thereto.
> 3. All documents seen by WGFD Deputy Chief McKay indicating that there might be a convicted arsonist on the WGFD, and all documents created by Deputy Chief McKay in response thereto.
> 4. All documents seen by WGFD Record Keeper Angela Taylor indicating that there might be a convicted arsonist on the WGFD, and all documents created by Angela Taylor in response thereto.
> 5. All documents seen by WGFD employee Gail Warner indicating that there might be a convicted arsonist on the WGFD, and all documents created by Gail Warner in response thereto.
> 6. All documents seen by WGFD employee Sheryl Nelligan indicating that there might be a convicted arsonist on the WGFD, and all documents created by Sheryl Nelligan in response thereto."

It is noteworthy that this request was made via your law firm's email, contained your law firm's signature block, and provided no indication that the request was made on behalf of Mr. Clark. The WGFD timely responded to your request on February 17, 2014. For each of the six requests the WGFD issued the same response:

> "The request seeks material outside the scope of the APRA definition of 'Public record' as defined in RIGL [§] 38-2-2(4); however, as to any such documents made or received pursuant to law or ordinance or the transaction of its official business, the WGFD does not have or maintain the requested records."

You filed the instant APRA Complaint on February 27, 2014, on behalf of Mr. Clark, alleging that the WGFD failed to provide documents responsive to your February 12, 2014 request and failed to indicate the specific reasons for the denial.[1] See R.I. Gen. Laws §§ 38-2-2(4), 38-2-7(a).

In response to the Complaint, this Department received a substantive response from the WGFD. The response stated, in relevant part:

> "As you can see, [the] APRA request sought records that various [WGFD] personnel had 'seen' that would indicate '. . . that there might be a convicted arsonist on the WGFD,' and any documents that these personnel may have generated in response.
>
> In the first instance, these requests go beyond the scope of an APRA request. Note that the [APRA] only requires the production of documents held by the public body. It does not require responses to inquiries, or for the public body to search for documents that it does not possess. *See, e.g., Scotti v. Town of Johnston*, PR 06-32. In order to respond to the request, one would have to answer an initial question as to what documents these individuals 'saw.' The [WGFD] officials were not required to respond to inquiries about what documents that they may or may not have seen at one time or another. Further, they would then potentially have to produce documents that they had 'seen,' but that the public body did not possess. Therefore, the [WGFD] properly responded that the request was beyond the scope of the APRA. []

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[1] You also alleged violations of R.I. Gen. Laws §§ 38-3-6, 38-1-4, and 38-2-3(j). This Department only has jurisdiction to investigate violations of the APRA, R.I. Gen. Laws § 38-2-1, et seq. See R.I. Gen. Laws § 38-2-8(b). As such, your allegations concerning R.I. Gen. Laws §§ 38-3-6 and 38-1-4 will not be addressed. There is also no indication that the public records were withheld "based on the purpose for which the records are sought" nor any indication that "as a condition of fulfilling a public records request, that [you were asked to] provide a reason for the request[.]" R.I. Gen. Laws § 38-2-3(j). Instead, the evidence demonstrates that the WGFD denied your request because it believed the request sought material outside the scope of the APRA. See West Broadway Associates v. Portsmouth Police Department, PR 14-26. As such, only the alleged violations of R.I. Gen. Laws §§ 38-2-2(4), 38-2-7(a) will be addressed.

> Finally, Mr. McBurney's suggestion that he was not given specific reasons for the denial rests on a position taken in his earlier APRA complaints – that it is not sufficient to cite the statutory exemptions to the definition of 'public record.' This is an issue that we have repeatedly argued before, most recently with respect to our March 25, 2014 rebuttal statement in Mr. McBurney's January 31, 2014 APRA complaint. Rather than set out those arguments again in this communication, we attach a copy of said March 25, 2014 rebuttal statement. [] In any case, as we have described above, Mr. McBurney's request for items that were 'seen' by public officials, rather than documents, was beyond the scope of an APRA request for public records. Therefore, citations to specific statutory exemptions were not applicable."

We acknowledge your rebuttal.[2]

At the outset, we note that in examining whether a violation of the APRA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the APRA as the General Assembly has written these laws and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the WGFD violated the APRA. See R.I. Gen. Laws § 38-2-8. In other words, we do not write on a blank slate.

As a preliminary matter, we conclude that Mr. Clark does not have legal standing to pursue to this complaint. See Schmidt v. Ashaway Volunteer Fire Association et. al., PR 99-21 ("[I]n order for this Department to have jurisdiction to inquire into an APRA matter, the complainant must first have requested a record from a public body, and second, the complainant must have been denied access to the requested record"). Here, the February 14, 2014 request was made by you, through your law firm's email, and provided no indication that the request was made on behalf of Mr. Clark. While the WGFD's denial speculated that the request was made on behalf of Mr. Clark, the February 14, 2014 request provided no such indication and we see no reason why our conclusion in this case should differ from our previous conclusions. See e.g., Clark v. West Glocester Fire District, PR 16-44. On this basis alone, we find no violation.

Notwithstanding the foregoing, based on the specific facts of this case, we find that the February 14, 2014 request was not a cognizable request under the APRA. We are mindful that this Department has "never required an APRA request to contain talismanic language in order to be

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[2] To the extent that your rebuttal alleges any additional violations of the APRA not already raised in your initial complaint, such new allegations will not be addressed. As stated in this Department's April 17, 2014 acknowledgment letter, "[y]our rebuttal . . . should not raise new issues that were not presented in your complaint[.]" See also Save the Bay v. Department of Environmental Management, PR 15-19. The acknowledgment letters to you and to the WGFD also stated, "after this opportunity to respond [via rebuttal], neither party will be allowed additional response without permission or inquiry from this Department." We neither granted permission, nor did either party request, to file any additional responses. Therefore, the WGFD's additional email correspondence of June 13, 2014 will not be addressed.

considered an APRA request," but that requests made pursuant to the APRA must be construed in a manner that advances the purpose of the APRA. See Campbell v. Coastal Resources Management Council, PR 08-33. Indeed, this Department has previously stated that the APRA governs the public's right to access public documents, but does not mandate or require that public bodies answer questions. See Gagnon v. City of East Providence, PR 12-23; see also Setera v. City of Providence, PR 95-20.

Additionally, our past findings make clear that the onus is on the requester to indicate what documents are being sought under the APRA. See Howard v. Department of Environmental Management, PR 11-35. We note that "it is the requester's responsibility to frame requests with sufficient particularity to . . . enable the searching agency to determine precisely what records are being requested." Assassination Archives and Research v. Central Intelligence Agency, 720 F. Supp. 217, 219 (D.D.C. 1989) (citations omitted); see also Palazzo v. Rhode Island Senate, PR 11-21.

Here, your request seeks documents "seen by" various individuals—to the exclusion of other individuals—as well as "all documents created by [that individual—again to the exclusion of other individuals—] in response thereto." These interrelated requests differ from typical requests in that they seek documents based on the document's relationship to various specified individuals and not based on the document's specific content. We find that this is a difference in kind, not degree.

Production of these requested documents would require a series of conclusions and assumptions by the WGFD that goes beyond the scope of a cognizable APRA request. It is unclear if documents "seen by" an individual means documents examined by or merely documents received by that individual and passed to another individual. Perhaps more to the point, such a request would require an individual to determine whether they have "seen" a document—a determination that may not be recalled—in order to conclude whether a particular document is responsive. Presumably, in some situations documents may have been "seen," but are no longer maintained by the WGFD. In such situations, the APRA—if it applied to this type of request—would require the WGFD to specifically exempt a document even though it was no longer maintained by the WGFD. Respectfully, you have not provided, nor are we aware of, any legal authority that would extend the APRA to this type of request.

The second request—"documents created by [that individual] in response thereto[,]"—is derivative of the first request and thus engenders the same complications. Indeed, whether or not a record is "seen by" an individual and whether or not a record is produced in response to that viewing is entirely and inherently unverifiable. Respectfully, the onus is on the requester to prevent such a quandary. See Assassination Archives and Research, 720 F. Supp. at 219.

In this case, we conclude only that the instant request seeking documents "seen" by various individuals to the exclusion of other individuals over an unspecified and indefinite period of time does not fall within the ambit of the APRA. As noted, supra, you have supplied no evidence or legal argument to the contrary. To highlight and support our conclusion, we note that you fault the WGFD for not producing two prior requests you made seeking access to various documents on the sole basis that your prior correspondences concerned "a possible arsonist on staff" and contained

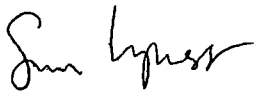
the words "arson" and/or "arsonist." Frankly, based on your request seeking documents "indicating that there might be a convicted arsonist on the WGFD," we would have hardly imagined that such a request would have been responsive to your February 12, 2014 request. Whether and to what extent the APRA might apply to a similar, but more verifiable and determinative request, is not before us in the present case. Therefore, based on the totality of the circumstances, we conclude that your requests are not proper requests for documents under the APRA.

We additionally note that "[p]ublic bodies are repositories of records, not libraries; and their administrators are not research assistants who should cull, compile or consolidate the data sought based upon their own idea of what is appropriately extrapolated from the existing records given the discernable objectives behind the request." Blais v. Revens, No. C.A. PC-01-1912, 2002 WL 31546103 at *9 (R.I. Super. Nov. 7, 2002). Having concluded that you did not make a proper APRA request, we accordingly find that the WGFD did not violate the APRA. See Block v. Block Island Volunteer Fire Department, PR 15-45. Though our conclusion makes determination of your remaining allegation unnecessary, the basis of our finding was also the basis of the WGFD's denial and was sufficiently stated.

Although the Attorney General has found no violation and will not file suit in this matter, nothing within the APRA prohibits an individual or entity from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior Court. See R.I. Gen. Laws § 38-2-8(b). Please be advised that we are closing this file as of the date of this letter.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,



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Cc: Noelle K. Clapham, Esq.